the compromise was binding. That, in my opinion, was entirely different from the point to be decided by me, which was whether the compromise was binding. I, therefore, held that the plea of estoppel failed.

COURT OF APPEAL.

H. E. Cashin for the appellants.

K. E. Hilborne for the respondent.

Rose C.J.: In paragraph 10 of their amended defence to the principal action the defendants appellants contend that the plaintiff is estopped in his claim for a declaration and for the repayment of a certain sum of money by reason of the fact that the same matter had already been adjudicated upon by way of a summons-in-chambers dated the 3rd of April 1958 before the then Chief Justice.

This question was dealt with, by consent, as a preliminary point by the learned trial Judge and he ruled that the point of law decided by the then Chief Justice and that which had to be determined in the present case are not the same. Reference to the notes of the proceedings at the hearing of the summons-in-chambers in 1958, which was for an order of entry of satisfaction of a judgment dated the 24th of September 1953, shows that in the first instance learned counsel in the case was of the view that the question to be determined was whether the compromise in question was valid. He thereupon asked for issues to be framed, to which course counsel for the plaintiff/respondent had no objection.

The learned Chief Justice, however, pointed out — in my opinion correctly — that it was inappropriate at that stage to frame issues in this matter as there was no action pending and that it would be for the defendants to bring a suit for a declaration as to their rights under the deed if they wanted that matter decided.

Whereupon learned counsel for the defendants/appellants asked for an adjournment to enable his opponent to file an affidavit in reply so that the Court would be in a position to say whether, within the meaning of Order 40 rule 26 of the Rules of the Supreme Court, the judgment creditor had reasonable ground for refusing to give consent to the entry of satisfaction.

Thereupon the proceedings were adjourned from the 14th of April 1958 to the 25th of April 1958. At the resumed hearing both counsel were heard and the learned Chief Justice then gave on oral decision which he noted in the following terms:—

> " I say that the only point I have to decide is whether the judgment creditor has reasonable ground for refusing to give consent.
>
> I say that in my opinion he has reasonable grounds because it is by no means clear that the compromise is binding."

It seems to me to be abundantly clear from this wording that the learned Chief Justice did not presume to decide the question of the validity of the compromise but merely whether or not there was an arguable case that the compromise was not binding.

Indeed from the material at his disposal it would have been difficult, if not impossible, for him to have decided anything more than he purported to do.

It was for these reasons that we were of opinion that the order of the learned trial Judge was right; and ordered that the appeal must be dismissed with costs.

Tan Ah Tah and **Chua JJ.** concurred.

Appeal dismissed.

Solicitors: *Rodyk & Davidson; Hilborne & Co.*

MICHAEL v. SOON TECK FINANCE CO. & ANOR.

[O.C.J. (Ong J.) October 27, 1961]

[K.L. — Civil Suit No. 514 of 1960]

Hire-purchase — Documents purporting to be agreement for hire purchase — Nature of transaction — Whether a sham to disguise a moneylending transaction.

The plaintiff bought a car from one Cheong which was subject to a hire purchase agreement between Cheong and one E.T.S. Finance Co. and on which a sum of $2,400 was still due to the said company. The plaintiff paid $4,700 and $1,000 was to be paid when the transfer was effected. The E.T.S. Finance Co. on coming to know of this sale served a notice on Cheong informing him that he had contravened the provisions of the hire purchase agreement with them and requiring him to pay the balance of $2,400. Cheong then purported to enter into a further hire purchase agreement with the first defendants who undertook to pay the E.T.S. Finance Co. the $2,400 and did so. On receipt of this amount the E.T.S. Finance Co. notified the Registrar and Inspector of Vehicles of their withdrawal of ownership of the said car. The first defendant immediately gave notice of ownership. Some time later the first defendant seized the said car whilst it was still in the possession of the plaintiff for default of instalments due from the said Cheong. The plaintiff then proceeded to the office of the first defendant and paid the sum of $702 being three months' arrears of instalments and secured the release of the car to himself. He then, by obtaining a duplicate of the registration card, registered himself as owner (after managing to get Cheong's signature on the prescribed transfer form). The car was later again seized by the first defendant but it was found that the original registration card showed Cheong as owner. The plaintiff now claims against the first defendant damages for conversion and against the second defendant the return of the car or its value.

Held: the hire-purchase agreement between Cheong and the first defendant was a sham to disguise a moneylending transaction and the entire transaction was consequently struck at by the Bills of Sale Ordinance and was void. Accordingly no valid title to the car passed to the first defendant whose seizure of the vehicle and subsequent dealing with it amounted to conversion.

Cases referred to:—

(1) *Polsky* v. *S. and A. Services* [1951] 1 All E.R. 185, 188.

(2) *Yorkshire Railway Wagon Co.* v. *Maclure* (1882) 21 Ch. D. 309; 51 L.J. Ch. 857.

(3) *British Railway Traffic & Electric Co.* v. *Kahn* [1921] W.N. 52.
(4) *Re Watson, ex p. Official Receiver in Bankruptcy* (1890) 25 Q.B.D. 27; 63 L.T. 209.
(5) *Madell* v. *Thomas & Co.* (1891) 1 Q.B. 230; 64 L.T. 9.
(6) *Eastern Distributors Ltd.* v. *Goldring: (Murphy, Third Party)* [1957] 3 W.L.R. 237, 239.

ACTION.

A. K. Menon for the plaintiff.

Kam Woon Wah for the 1st defendant.

Chooi Man Sou for the 2nd defendant.

Cur. Adv. Vult.

Ong J.: The plaintiff in this action claims against the first defendant damages for conversion of a Peugeot motor-car, and against the second defendant the return of the said motor-car or its value.

The material facts which are not in dispute are as follows: Early in January 1959, the plaintiff, who was then Chief Driving Tester in the Department of Road Transport, Selangor, required a car to replace one which had become a total loss in an accident. One, Cheong Chear Chang, a commission agent, was desirous of selling a Peugeot car of which he had the use under a hire-purchase agreement made on April 16, 1958 with Eu Tong Sen Finance Limited (hereinafter referred to as E.T.S.). Out of the total sum of $8,281.25 payable to E.T.S. under the agreement, Cheong was still liable to pay approximately $2,400 before the car became his property. The parties met together on January 5, 1959 and on January 7 they signed an agreement in these terms :

7th January, 1959.

I, Cheong Chear Chang, I.C. No. Pk. 545303 of No. 6 Road 69A, Petaling Jaya, Kuala Lumpur, agreed to sell my car Register Number BE. 279 "Peugeot" 403 to Mr. J. Michael for the sum of M. $5,700 which has already been received in full payment. The necessary transfer of the car would be made on 15th January, 1959.

Seller (Sd.) C. C. Cheong.

Buyer (Sd.) J. Michael.

P.N. The balance of $1,000 would be paid on the day of transfer.

The car has already been handed (sic) to the buyer in good order and condition.

The plaintiff was thereupon given possession of the car. This transfer of possession subsequently came to the knowledge of Wong Peng Wah, manager of E.T.S., who had been trying to locate the car for seizure on account of non-payment of some instalments of hire, and early in March he managed to see the plaintiff whom he had known for some years. Having been told by Wong of the hire-purchase agreement, the plaintiff's reply was that he had made arrangements with Cheong to take over the vehicle. Wong then advised the plaintiff that it would be in Cheong's interest to pay up all the instalments of hire in arrear or for him to terminate the agreement to his own advantage. On March 10, 1959 Wong sent a notice to Cheong, with a copy to the plaintiff, as follows :—

Hire Purchase Agreement K.L. 851
Vehicle BE. 279.

We have in our possession certain information that you have contravened the conditions of the above agreement in selling the vehicle concerned to one Mr. J. Michael of the Road Transport Department, Kuala Lumpur without first settling the outstanding account of $2,400 due to us under the said agreement.

We now serve notice to you that unless the said sum of $2,400 is received by us within seven days from the date hereof, immediate action will be taken under the terms and conditions of the said agreement.

What the recipients of this notice did during the latter part of March is not clear. The plaintiff and Cheong gave conflicting versions. At any rate, in the beginning of April, Yeo Kean Teck, then manager of Soon Teck Finance Co., the first defendant, telephoned to Wong to inquire about the hire-purchase agreement between E.T.S. and Cheong and the amount outstanding. Wong told him the amount due and at the same time added for Yeo's information, as they were in the same line of business, that he understood the car to have been "sold by Cheong to Michael of the R.I.M.V. by private arrangement."

On April 2, one Loke Beng Chiew, a clerk of the first defendant, proceeded to E.T.S. and paid up the balance due in full settlement of Cheong's account. Wong issued him a temporary receipt made out in the name of the hirer, Cheong. On the same day E.T.S. gave notice to the Registrar & Inspector of Motor Vehicles withdrawing their claim to ownership of BE. 279; the first defendant immediately gave notice claiming ownership of the same vehicle. On April 3, a hire-purchase agreement was made between the first defendant and Cheong. The first defendant at the same time issued to Cheong a receipt for $2,000 as paid on the execution of that agreement. In the original Registration Book of BE. 279 Cheong was the first registered owner. The subsequent changes were as follows :

1st change dated April 2, 1959; Loke Beng Chiew, of 149 Bukit Bintang Road, Kuala Lumpur; 2nd change dated April 7, 1959, Yeo Kean Teck of Soon Teck Finance Co. (K.L.); 3rd change, again dated April 7, 1959, Cheong Chear Chang.

Nothing untoward happened during the next six months. Then in October the first defendant seized the car for default in payment of some instalments of hire. On October 17, the plaintiff went in person to the office of the first defendant, paid up the sum of $702 for three instalments in arrear, for which he was issued a temporary receipt made out in the name of Cheong, and secured the release to himself of the car.

On October 24, the plaintiff managed to obtain Cheong's signature on the prescribed transfer form, and on the same day managed further to obtain a duplicate Registration Book

from the Registrar & Inspector of Motor Vehicles, and to cause himself to be registered as owner. These are admitted facts, although there is a serious conflict between the testimony of Cheong and the plaintiff as to the circumstances in which Cheong came to sign the transfer.

Finally on November 27, the first defendant seized the car once more while it was in the R.I.M.V. car-park where it had been left by the plaintiff. After its seizure the car was admitted in the defence of the second defendant to have been handed over to him by the first defendant. However, in view of the common defence of bailment the case of the second defendant must stand or fall with that of the first defendant and need not be considered separately.

I pass now to the facts in dispute. This case is unlike others involving hire-purchase agreements, in which the ever-recurring question arises: which of two innocent parties is to suffer by the fraud of a third? In the first place Cheong has not disappeared; yet he has not been sued, although he was mainly responsible for the plaintiff's loss and damage. In the second place, Cheong, although summoned to Court by the first defendant, was called by the plaintiff as his own witness with full knowledge that he was personally interested in contradicting the plaintiff in all material particulars of his testimony. In the event, he did prove to be hostile to the party calling him as witness. The problem thus arises whether and to what extent I should prefer his testimony to that of the plaintiff, wherever there is a conflict, because the principle is that a party offers his witness as a witness of truth. The points on which they are at variance are: as to whether the plaintiff had paid to Cheong the purchase price of $5,700 in full, or at all; as to whether the plaintiff entered into the agreement of January 7, 1959 with knowledge of the hire-purchase agreement between Cheong and E.T.S.; as to the plaintiff being in continuous possession of the car from January 7, 1959 till its final seizure on November 28, 1959; and as to the circumstances in which the transfer form came to be signed by Cheong on October 24, 1959.

Neither the plaintiff nor Cheong impressed me as being scrupulous about telling the whole truth, so that it falls on me to discover where the truth lies. Taking the evidence as a whole, however, certain salient facts may be extracted which I think are indisputable. First, I am satisfied and find as a fact that the plaintiff agreed to buy the car with full knowledge that Cheong had no power to sell. It is impossible to give the slightest credence to the ridiculous explanation offered by the plaintiff for his omission to verify facts from files which were available literally at his finger tips. Secondly, I find as a fact that $5,700 represented a fair market price for a second-hand Peugeot which had been used for nine months. Thirdly, because the addendum at the foot of the agreement of January 7, 1959, was a double-edged weapon, and because Cheong has not explained why he accepted without protest a statement in writing that only $1,000 was still owing, I find as a fact that the sum of $4,700 had been paid when the plaintiff was given possession of the car on January 7. Cheong could not have handed over the car for no other consideration than the plaintiff's promise to keep up future payment of instalments, and during all the succeeding months ask for no payment at all from the plaintiff. There should have been $3,300 due to him, and he must have been in need of the money. Fourthly, I find as a fact that the plaintiff had continuous possession of the car from January 7 till its final seizure on November 28. Having been satisfied as to the actual payment of $4,700, and since it was reasonable that the balance of $1,000 should have been retained because Cheong was unable to produce the Registration Book for the purpose of transferring the vehicle, I must reject Cheong's explanation as to how he was able to regain possession of the car temporarily in March for the purpose of reselling it to Loke Beng Chiew, the first defendant's clerk. Fifthly, I find as a fact that the plaintiff did resort to a stratagem to persuade Cheong to sign the transfer form on October 24. It is to be remembered that Cheong had promised to transfer the car on January 15, and his disinclination or inability to fulfil his promise for nine months left the plaintiff no alternative course after he had paid up the balance of the purchase price.

From the above findings of the primary facts it is not difficult to decide the sole issue between the plaintiff and the first defendant, namely, whether the latter had any legal title to the car in order to seize it as owner. Mr. Menon, counsel for the plaintiff, submits on the authority of *Polsky* v. *S. and A. Services*[1] that the transaction between Cheong and the first defendant was in fact and in truth a loan of money on the security of the vehicle, and that non-registration under the Bills of Sale Ordinance renders the so-called hire-purchase transaction void, so that no legal title passed to the first defendant. Lord Goddard C.J. in his judgment said, at page 188, as follows:

> "If the defendants had bought this car from a dealer, all these documents would have been completely in order and no question could have arisen as to the Bills of Sale Acts having any application to the transaction. What I have to decide is whether this transaction was in fact what it purported to be or whether it was in truth no more than a loan by the defendants of £400, with interest, on the security of the car. If the latter is the true view of the transaction, it is clear that the hire-purchase agreement was no more than an assurance of personal chattels by way of security for the payment of money, and, accordingly, it is a bill of sale within the meaning of the Bills of Sale Act (1878) Amendment Act, 1882, section 3, and, being unregistered, it is void under section 8 of the Act. A considerable number of cases were cited to me on the point which may, I think, be conveniently divided into two lines of authority. There is, on the one hand, the class of case, of which *Yorkshire*

Railway Wagon Co. v. *Maclure* (2) and *British Railway Traffic & Electric Co.* v. *Kahn* (3) are good examples, where the transaction in question has been held to be a genuine sale followed by a hire-purchase agreement, and, therefore, unaffected by the Bills of Sale Acts, and, on the other hand, there is the class, which includes *Re Watson, Ex p. Official Receiver in Bankruptcy* (4) and *Madell* v. *Thomas & Co.* (5), where the Court has held, on facts not very dissimilar from those in the present case, that the real transaction was one of loan, and, therefore, it was avoided by reason of the Acts. There is no doubt, I think, as to the deciding principle. The Court has to determine whether the transaction in question is a genuine sale by the original owner of the chattel to the person who is finding the money and a genuine re-letting by the latter to the original owner on hire-purchase terms, or whether the transaction, though taking that form, is nothing more than a loan of money on the security of the goods. It is perfectly clear from the judgments of Lord Esher M.R., in *Re Watson* (4) and in *Madell* v. *Thomas & Co.* (5) that that is the question which has to be determined. The Court is not to look merely at the documents. It must discover what the real transaction was."

Then Lord Goddard lays down the test which may be applied:

"It seems to me that one of the most satisfactory ways of deciding what the true nature of the transaction was is to see whether the documents themselves accurately set out the deal between the parties as it took place and at the time when it took place, or whether the facts, or some of them, therein recorded do not truly represent that which happened, but give the transaction what I may call an innocent appearance."

Applying this test, I have no doubt in my mind that the hire-purchase agreement of April 3, 1959 was a sham to disguise a money-lending transaction. The hocus-pocus that started with the telephone inquiry by the first defendant's manager Yeo Kean Teck from Wong of E.T.S. down to the fictitious transfers between April 2 and 7 were plainly maladroit attempts at camouflage. It is quite impossible to overlook one very cogent fact: that when the car was purported to have been sold by Cheong through the first defendant's servants to the first defendant it was throughout in the actual possession of the plaintiff. Furthermore, no responsible officer from the first defendant's office was called to testify to the transaction being a *bona fide* one of hire-purchase. This case therefore clearly is not one of the type of which Devlin J. said in *Eastern Distributors Ltd.* v. *Goldring; (Murphy, Third Party)* (6) as follows:

"There is nothing to prevent the owner of a vehicle from selling it to a hire-purchase company, pocketing the price and paying it back by instalments; and provided the sale is a genuine one and not a sham, effect will be given to it as a hire-purchase contract."

In my opinion the truth is as follows: Cheong was anxious to escape the burden of having to pay as much as $349 per month to E.T.S. His arrangement in January with the plaintiff had provided a temporary solution. Unfortunately, he preferred to use the moneys he received from the plaintiff for his own personal purposes, rather than to pay off the balance due to E.T.S. The notice of March 10, from Wong of E.T.S., however, compelled him to act. He therefore had to save the situation as best he could. He then went to the first defendant, whose manager devised the pseudo-hire-purchase agreement. The first defendant provided the money to settle with E.T.S. and Loke and Yeo were both servants and tools of their employers. Significant evidence on this point was given by Cheong who said that because E.T.S. was pressing him for payment he had to persuade the plaintiff to return him the car in March for the purpose of raising money thereon. It is therefore quite clear that Cheong agreed to transfer his car in any manner he might be directed to do so by the first defendant provided only that he was granted a loan by the latter on the security of his car on easier terms than his existing commitments to E.T.S. The entire transaction is consequently struck at by the Bills of Sale Ordinance, 1950. The result is that the so-called hire-purchase agreement is void, and no valid title to the car passed to the first defendant. As the plaintiff was in lawful possession of the car when it was seized by the first defendant without any lawful title the latter was guilty of trespass, and dealing with the vehicle amounted to conversion. Accordingly judgment in this action must be given for the plaintiff.

As to the order which I should make, I am in some difficulty on this score as no evidence has been given regarding the value of the car when it was seized by the first defendant. It is admitted to be in the possession of the second defendant but its condition might have deteriorated considerably between November 1959 and the present day, for which the plaintiff is not responsible. In all the circumstances therefore I think the appropriate order should be: that the said motor car be delivered up to the plaintiff; alternatively, and at the plaintiff's option, that the plaintiff recover against the defendants the value of the car which I would assess at $5,000. As to special damages, the plaintiff's claim appears to me to be grossly exaggerated. In any event it was his duty to mitigate his own loss and damage. I think $1,000 should be fair compensation. Costs follow the event.

Judgment for the plaintiff.

Solicitors: *Braddell & Ramani; Kam Woon Wah & Co.; Chooi Man Sou.*

PUBLIC PROSECUTOR v. PHEE JOO TEIK

[C.A. (Thomson C.J., Good J.A. and Ong J.) November 1, 1961]

[K.L. — F.M. Criminal Reference No. 1 of 1961]

Criminal law — Penal Code (Cap. 119), ss.161 and 165 — Obtaining bribe as public servant.

Town Councillor — Whether a 'public servant' within Penal Code — Whether the Butterworth Town Council was lawfully constituted.

The respondent in this case, a Town Councillor of the Butterworth Town Council, was charged under sections 161 and 165 of the Penal Code for obtaining a bribe as a public servant. A preliminary point was